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No. 88-1586.

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

GEORGE JACKSON,
PETITIONER,

v.

LIQUID CARBONIC CORPORATION,
AND DAVID FARRELL AND BARRY MANUEL,
D/B/A INDUSTRIAL MEDICAL CENTER,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondent, Liquid Carbonic Corporation in Opposition.

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May 18, 1989

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QUESTIONS PRESENTED

1. Does § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, pre-empt state-law privacy claims asserted by a unionized employee after his termination, when:

(a) the employee was employed as a truck driver under a collective bargaining agreement which authorized the employer to issue reasonable rules and regulations, and to require the covered employees to undergo the periodic physical examinations mandated by federal highway safety laws; and

(b) the physical examinations mandated under those laws required the employees to furnish urine specimens for urinalysis; and

(c) the employer, in the exercise of its contractual authority, and as a condition of employment under the agreement, prescribed a drug-screen for the urine specimens furnished under those pre-existing federal requirements; and

(d) the employee was terminated after the prescribed drug-screen revealed the presence of drugs in his urine; and

(e) the employee's union and exclusive bargaining representative under the collective-bargaining agreement did not seek to arbitrate the employee's claims under the grievance and arbitration provisions of the collective-bargaining agreement; and

(f) the privacy claims challenge the

propriety and application of the drug-screen.

2. Does a federal court's diversity-case ruling that § 301 pre-empts a state-law privacy claim preclude the state from thereafter determining the scope of its privacy law with relation to claims of a similar nature?

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 88-1586

GEORGE JACKSON,

Petitioner,

v.

LIQUID CARBONIC CORPORATION,
and DAVID FARRELL and BARRY MANUEL,
d/b/a INDUSTRIAL MEDICAL CENTER,

Respondents.

BRIEF OF RESPONDENT LIQUID CARBONIC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Defendant-Respondent Liquid Carbonic Corporation ("L-Corp.") opposes the Petition for Writ of Certiorari filed by Plaintiff-Petitioner George Jackson ("Jackson"). The Petition raises no significant legal issue, and misreads or misapplies the governing decisions of this Court.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). Removal jurisdiction was asserted below under 28 U.S.C. § 1441 on grounds of diversity of citizenship and requisite amount in controversy under

28 U.S.C. § 1332(a). (App. 7a, 71a)[1]/

1/ "App. 7a, 71a" refers to pages 7a and 71a of the appendix to the Petition. Similar references are used throughout this brief.

STATEMENT OF THE CASE

A. The Facts

At the time of his dismissal by L-Corp. in February, 1986, Jackson was employed as a truck driver in a bargaining unit of L-Corp. employees covered by a collective-bargaining agreement ("the Agreement") between L-Corp. and a Local ("the Local") of the Teamsters Union. As noted in the First Circuit's majority opinion below, Jackson's job was to haul "pressurized gases . . . which were invariably volatile [and] often hazardous." (App. 3a) During his ten years of employment by L-Corp. (App. 2a), Jackson was accordingly subject to the safety regulations issued by the Federal Highway Safety Administration of the United

States Department of Transportation. These regulations mandated that covered truck drivers submit to biennial medical examinations which required, inter alia, submission of urine specimens for diabetes urinalysis. (App. 4a)

At all material times, the Agreement empowered L-Corp. to issue "reasonable rules and regulations," and to require the covered employees to undergo periodic physical examinations. In addition, the Agreement prohibited L-Corp. from discharging employees except for "just cause," and mandated arbitration of all unresolved grievances. (App. 5a-6a, 74a-75a, 80a-82a)

In March, 1985, while the Agreement was in effect, L-Corp. issued a directive which added drug-screening to the

urinalysis already required of its truck drivers under the federal program. L-Corp. notified all the drivers that their consent to the drug-screen was a condition of continued employment. Jackson consented, and neither he nor the contracting Teamster Local challenged the drug-screen at the time. (App. 4a-5a)

In January, 1986, Jackson took a scheduled physical examination and submitted a urine specimen, as he had routinely done in the past on such occasions. In February, 1986, L-Corp. informed Jackson that the drug-screen of his specimen had detected traces of marijuana, and suspended him pending retesting. A week later L-Corp. discharged Jackson for the reason that retesting had confirmed the presence of

drugs in his urine. (App. 5a, 74a) Neither Jackson nor the Teamster Local filed a formal grievance under the Agreement against the discharge (App. 6a, 75a); nor have they ever attempted to invoke any of the remedies available to them under the Agreement, including arbitration, against any action of L-Corp. involved in this matter.

B. Proceedings Below

In December, 1986, Jackson commenced an action for equitable relief and damages against L-Corp. in the Middlesex County Superior Court of Massachusetts. The gravamen of the complaint was: (1) that L-Corp.'s conduct constituted a search and seizure of Jackson's urine in violation of Mass. G.L. c. 12, § 11H-11I ("the Massachusetts Civil Rights Act"),

in that it breached his rights to privacy, and to freedom from unreasonable searches and seizures, as secured by the state and federal constitutions; and (2) that the alleged seizure and the testing of the urine constituted an unreasonable invasion of Jackson's privacy in violation of Mass. G.L. c. 214, § 1B ("the Massachusetts Privacy Act").[2/] (Jackson also claimed relief on the ground that his dismissal constituted a wrongful discharge under Massachusetts common-law; however, he did not appeal from the District Court's dismissal of this particular claim, see infra.) (App. 9a)

2/ The texts of the Massachusetts Civil Rights Act, and the Massachusetts Privacy Act, are set out at pages 3-5 of the Petition.

L-Corp. removed the state-court action to the United States District Court for the District of Massachusetts on grounds of diversity of citizenship and requisite amount in controversy. (App. 7a, 71a) (L-Corp. also originally sought removal on the federal question grounds that Jackson's action constituted a suit for violation of a collective bargaining agreement under § 301 of the Labor Management Relations Act. Both the District Court and the First Circuit declined to address this basis of removal jurisdiction. (App. 7a, n.2; 71a, n.1))

On L-Corp.'s motion to dismiss, treated as a motion for summary judgment, the District Court granted summary judgment for L-Corp. on all of Jackson's claims, including the wrongful-discharge

claim. The court held that all of these claims necessarily implicated the terms of the Agreement, and hence were pre-empted by § 301 under the rule of Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 220 (1985). (App. 77a-83a)[3/]

In affirming the summary judgment, the majority of the First Circuit's three-judge review panel conducted an extended analysis of the Massachusetts Civil Rights and Privacy statutes, and the decisions which the Massachusetts Supreme Judicial Court ("SJC") had issued thereunder to date. The majority found that L-Corp.'s drug-testing plan did not violate any right under either statute,

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3/ The text of § 301 is set forth at page 3 of the Petition.

which was "presently established" and existed independently of the Agreement. (App. 29a, n. 3, emphasis supplied) The majority found further that, if indeed Jackson had any claim against L-Corp. under either statute, ". . . it is based on rights secured by [the] Agreement, and must be pursued, therefore, only in the arbitral forum." (Id.) The majority concluded that resolution of Jackson's purported state law privacy claims "'requires the interpretation of a collective-bargaining agreement,'" and that Jackson's state-court action was therefore pre-empted by § 301 under the rule of Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct., at 1883, n.8. (App. 55a) In support of its application of the Lingle rule, the majority relied

on Utility Workers Union of America, AFL-CIO, Local No. 246, et al. v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989. (App. 41a-42a)

The dissenting opinion characterized the majority's analysis of existing Massachusetts Privacy law as a "guess," and held that the case should be remanded to the state court for a determination of the state law claims. (App. 59a, 69a)

Thereafter, the court denied Jackson's petition for rehearing (including a request for certification of questions to the Massachusetts Supreme Judicial Court concerning the two statutes in issue), and suggestion for rehearing en banc. (Petition at 24; App. 86a)

SUMMARY OF ARGUMENT

There is no merit to the contention that the majority decision below conflicts directly with the decisions of this Court on the standard of § 301 pre-emption, and the waivability of pre-empted state-law rights. (Petition at 17-19, 28-34) This contention misreads this Court's decisions, and misrepresents the majority decision.

Contrary to the Petition at 19-28, the majority decision raises no federalism issue. The majority's analysis of the existing state of Massachusetts privacy law was an appropriate exercise of the federal court's well-settled authority to decide state-law issues in diversity cases.

The majority's ruling would not preclude Massachusetts from determining the scope of its privacy law vis-a-vis employees covered by collective-bargaining agreements.

The majority's pre-emption ruling is in accord with analogous cases from other circuits. In addition, this Court has recently denied certiorari in a case which is identical with the case at bar. Utility Workers Union of America, AFL-CIO, Local No. 246, et al. v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989.

REASONS FOR DENYING THE PETITION

I. THE MAJORITY DID NOT DEPART FROM THIS COURT'S DECISIONS ON THE STANDARD OF § 301 PRE-EMPTION.

A. In Lingle, this Court held that § 301 pre-empts a purported state-law claim if the "pertinent principles of state law require[] construing the relevant collective-bargaining agreement." 108 S. Ct., at 1882, n.7. The Petition contends that the majority flouted this rule by finding only ". . . that petitioner's state law claims were not yet so clearly established by statute or judicial explication" as to preclude analysis of the Agreement. (Petition at 18-19)

The majority made no such finding. It did acknowledge that Massachusetts would be free in the future to endow unionized employees with an "independent"

right to be free from employer drug-testing. (App. 29a, n.3) But it did not find, as the Petition suggests, or even imply, that such action by the state was in the offing. On the contrary, it found that (1) no such independent right had been established, as of the time of its decision, under the state Civil Rights and Privacy statutes; (2) the established rule for resolving a workplace-privacy dispute under these statutes was a balancing of the employee's and the employer's respective interests; and (3) the SJC would look to collective bargaining agreements in applying the balancing test in future workplace drug-testing cases. (App. 15a-19a, 21a-29a, n.3, 46a) The last finding was fully in keeping with the

authority of the majority, as a federal court sitting in diversity, to decide unsettled state-law issues pending before it.[4/] It constituted an integral element of the state-law principles which the majority determined. Based on these principles, the majority concluded that the requisite balance could not be struck in the instant case without interpretation of the Agreement. (App. 31a-41a). Hence, Jackson's claims were pre-empted under Lingle. (App. 30a, 43a, 46a, 55a)

B. The Petition also contends that the majority violated the Lingle rule, in that (1) it found that Jackson's state-claims were "'not necessarily

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[4/] See further Part III infra.

independent of the labor contract,'" whereas (2) the "proper test is not whether state law claims are 'not necessarily independent' of the agreement, but whether they are necessarily dependent on the agreement." (Petition at 19)

Apart from this dubious wordplay,[5/] this contention misrepresents both the established pre-emption standard and the majority's decision. "Dependence" and "independence" are merely the obverse facets of the standard. This Court has articulated the principle of § 301 pre-emption as "substantial dependence"

5/ This statement of the assertedly "proper" test suggests that "not independent of" and "dependent on" have opposite or dissimilar meanings. But, if anything, they are semantic equivalents.

on a labor contract. Lueck, 471 U.S., at 220-221, restated in Lingle, 108 S. Ct., at 1881. But it typically applies the principle in terms of whether the disputed state-claim is "sufficiently independent" of the contract to escape pre-emption. Lueck, 471, U.S., at 213-214. Lingle, 108 S. Ct., at 1881-1882.

The majority's approach incorporated both aspects of the standard, with the "dependence" principle as the point of departure. (App. 13a-14a) In applying the principle, it inquired whether, under existing Massachusetts privacy law, Jackson had a right, "independent" of the Agreement, to be free from L-Corp.'s drug-screen, in the absolute (i.e., "necessary") sense of a constitutional or

statutory prohibition of drug-testing. It concluded that he did not. (App. 15a-30a, 34a-35a). It then inquired whether Jackson had a "clearly independent" right as a derivative of the "pertinent principles" of Massachusetts law. (App. 30a). In the context of the balance-of-interest principle, the majority said:

> "The question for this court, therefore, reduces to whether the balance of interests between Jackson and L-Corp. necessarily implicates the Agreement in some substantial sense."

(App. 30a -31a) Thus, the majority once again invoked the "substantial dependence" standard which the Petition claims that it did not apply. And it concluded that Jackson's claims were "clearly dependent" on the Agreement, and

thus pre-empted. (App. 54a)

C. There can be no doubt that the majority scrupulously followed this Court on the pre-emption standard. The Petition's claim to the contrary is patently false.

II. THE MAJORITY DID NOT DEPART FROM LINGLE ON THE ISSUES OF WAIVER OR WAIVABILITY.

A. Contrary to the Petition at 30-32, this Court did not decide in Lingle either (1) that pre-emption and waiver are separate issues in a § 301 pre-emption inquiry; or (2) that in conducting such an inquiry, the federal court must determine the waivability, under state law, of state-claims that are found not to exist independently of labor contracts.

In Lingle, the Court held that a unionized employee's retaliatory-discharge claim under a state workers' compensation statute was not pre-empted under § 301, because it was based on a right which was specifically created by the statute and could be adjudicated independently of the relevant labor contract. 108 S. Ct., at 1882-1883, 1885. The rationale of this decision reiterated the well-settled nonpre-emptability of an individual substantive right derived from "an

independent body of law."[6/] In dicta, the Court declined to decide "[w]hether a union may waive its members' individual, nonpre-empted state-law rights," a question which the Court characterized as "distinct from that of whether a claim is pre-empted under § 301." 108 S. Ct., at 1883, n.9, emphasis on "nonpre-empted" supplied. The Court added that, before

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6/ In Lueck, 471 U.S., at 213, n.8, the Court said:

> "In Alexander v. Gardner-Denver Co., 415 U.S. 36 ... (1974), the Court found that the NLRA conferred rights 'on employees collectively to foster the processes of bargaining,' Id., at 51, and distinguished such rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other." (Emphasis supplied)

deciding that a state bar to waiver of nonpre-empted state-claims could itself be pre-empted, it would require clear evidence that such waiver had been intended. Id.

The dicta, on their face, applied only to the waivability, and waiver, of state-claims that are nonpre-empted because they are found to exist independently of a labor contract. This is indeed a different question from whether state-claims are dependent on a labor contract, and thus pre-empted, in the first instance.

As to the latter issue, it is well-settled that " . . . state-law rights that do not exist independently of private agreements, and that as a result can be waived or altered by private

parties, are pre-empted by those agreements." Lueck, 471 U.S., at 213, emphasis supplied, and see Id., n.8, referred to at n.6, supra. In this sphere, waiver is not, as the Petition erroneously urges, a separate issue from pre-emption. It is rather an aspect of the state-claim's dependency on the labor contract which requires its pre-emption.

B. In specific reliance on this teaching of Lueck, the majority below found that Jackson's purported state-claims depended to a great extent on the concessions which his union might have made to L-Corp. under the Agreement. Thus, in the majority's view, the scope of Jackson's privacy-expectations would hinge on

whether the mandatory drug-screen[7/] was a legitimate exercise of L-Corp.'s managerial right to issue "reasonable" rules and conduct "required" physical examinations. Since this determination would necessarily entail interpretation of the Agreement, Jackson's claims were pre-empted under the rule of Lueck and Lingle. (App. 35a-37a, 39a-41a) The majority cited, at App. 42a, the

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7/ The Petition erroneously characterizes L-Corp.'s drug-testing plan as "mandatory random drug testing." (Petition at 31, emphasis supplied) Random testing inherently connotes a " . . . program of testing at random of persons within the class" covered by the drug-test directive. Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 532 N.E.2d 644, 645 (1989). But L-Corp.'s plan applied to all members of the bargaining unit as a condition of continued employment. (App. 4a)

waiver-holding of the Ninth Circuit in Utility Workers, supra, 852 F.2d 1083, 1086 (9th Cir. 1988), cert. denied No. 88-1180, March 20, 1989 (claim that employer's unilateral implementation of drug-testing program violated employees' rights to privacy and freedom from unreasonable searches and seizures under state constitution, held pre-empted under § 301, where issue of whether employees' union had bargained away their claimed rights could not be resolved without reference to the employer's management rights under the labor contract.)

Contrary to the Petition, nothing in Lingle required the majority to make separate findings on pre-emption and waiver, or to determine in the first instance whether Jackson's claims were

waivable by the union under Massachusetts law. The Lingle dicta, supra, which the Petition cites on the waivability issues, and the authorities collected at p. 31, n.8 and p. 33, n.10 of the Petition, are all inapposite, since they apply only to state-claims arising from independent bodies of law, see n.6, supra.

II. THE MAJORITY'S DECISION DOES NOT RAISE ANY QUESTION OF FEDERALISM.

A. The Petition contends that the majority's decision, if allowed to stand, would lead to automatic removal on § 301 pre-emption grounds of any future state-privacy claims similar to Jackson's, and would bind the federal court on the merits of the claims, thereby precluding Massachusetts and its courts from ever

developing the scope of its privacy law with relation to employee drug-testing. (Petition at 22-23)

This confuses jurisdiction with merits, and fails to grasp that, as this Court has held, "§ 301 pre-emption . . . says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements." Lingle, 108 S. Ct., at 1883. As the Court opined, a state law could conceivably cover only unionized workers but remain unpre-empted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder. Id., at 1882, n.7. Thus, nothing in § 301 or the majority's ruling

below would bar Massachusetts in the future from granting unionized workers individual privacy rights against drug-testing which were made clearly independent of the interpretation of collective-bargaining agreements. If the state should do so, then state-court actions grounded on such individual state-rights would not be removable on § 301 pre-emption grounds. Caterpillar Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425 (1987). There is no basis for the Petition's federalism claim.

B. Jurisdiction below was asserted solely on diversity grounds. As a federal court setting in diversity, the First Circuit review panel was obliged to determine all the state-law issues pending before it, including those which

had not as yet been settled by direct decisions of the SJC. And, as to such unsettled issues, the First Circuit was obliged to predict what it conscientiously believed the SJC would find when confronted with them. Meredith v. City of Winter Haven, 320 U.S. 228, 234-237 (1943). Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 464-465 (1967). In essaying such a prediction, the First Circuit was entitled to consider analogous decisions of the SJC, scholarly works, and any other data tending convincingly to show how the SJC would decide the unsettled issues at hand, taking into account the trends and policies evinced by the relevant data. Michelin Tires (Canada) Ltd. v. First National Bank of Boston,

F.2d 673, 682 (1st Cir. 1981). Wright, Miller & Cooper, "Federal Practice and Procedure," § 4507 (1988 ed.).

The body of the majority's opinion discloses that it carefully and conscientiously carried out its mandate as a diversity-court in predicting that the SJC would bring collective-bargaining agreements into play in deciding cases of the instant nature. It is noteworthy that the Petition does not challenge the validity of any of the majority's stated bases for this "confident" (App. 28a) prediction. For instance, the Petition does not challenge the majority's conclusion that state privacy and constitutional law generally track the development of federal law. (Petition at 21) It argues only that the majority's

ruling has precluded Massachusetts from ever making its own determination of the matter. (Id., at 22) However, this is not the case, since a diversity-court's adjudication of unsettled state-law issues does not bind the state's highest court. Neu v. Grant, 548 F.2d 281, 283 (10th Cir. 1977). Given that the Petition has advanced no convincing reasons for questioning the majority's findings, they are entitled to acceptance by this Court. Bosch, supra, 387 U.S., at 464.

C. The Petition requests this Court, inter alia, to certify questions concerning the state Civil Rights and Privacy statutes to the SJC. (Petition at 23-27). However, it has advanced no reason to believe that the First Circuit erred in denying Jackson's prior request

for such certification, see p. 12, supra. Certification, where available, rests in the sound discretion of the federal court. Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974). Where a federal diversity-court feels that the course which the state courts will take is reasonably clear, as is the case here, resort to certification is inappropriate. City of Houston v. Hill, ___ U.S. ____, 107 S.Ct. 2502, 2514 (1987). Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc., 757 F.2d 440, 443, n.3 (1st Cir. 1985). Wright, Miller & Cooper, "Federal Practice and Procedure," supra, § 4248.

The Petition's request gains no support from the two drug-testing cases which the SJC decided after the issuance

of the majority's decision. (Petition at 24, n.5) Horsemen's, supra, 532 N.E.2d 644 (1989), involved a challenge under Article 14 of the Massachusetts constitution to a drug-testing program implemented by the state racing commission and does not address either of the Massachusetts statutes at issue in the instant case. Id, at 648. The SJC refused to find that mandatory, without-cause drug-urinalysis of race-track licencees was a reasonable search and seizure under the constitution merely because the racing industry is heavily regulated. It held that a reasonable need to invade the licensees' urologic privacy had not been demonstrated. 532 N.E.2d at 650-652. However, the SJC noted that the case

presented no public safety issue, and expressly reserved the result it would reach if confronted with such a case. Id, at 651, continuation of n. 3. Since the instant case does present a substantial public safety issue, the decision in Horsemen's obviously does not warrant certification. This is even more the case as to Bally v. Northeastern University, 403 Mass. 713, 532 N.E.2d 49 (1989), also cited by the Petition in this connection. The SJC construed the state Privacy and Civil Rights statutes, but in a context outside the scope of private employment. Id, at 54.

IV. THE MAJORITY'S DECISION ACCORDS WITH THE SUBSTANTIAL WEIGHT OF FEDERAL LAW ON EMPLOYEE DRUG-TESTING.

The dispositive issues in the instant case are identical with those in Utility Workers, supra, 852 F.2d 1083, on which the majority specifically relied (App. 42a), and in which this Court denied certiorari to the Ninth Circuit on March 29, 1989. There the Ninth Circuit held that § 301 pre-empted claims that the unilateral implementation of a drug-screen urinalysis by a nuclear power-plant operator violated its unionized employees' rights under the state constitution to privacy and freedom from unreasonable searches and seizures. The court ruled that the asserted state privacy-claims were "substantially dependent" on analysis of the employer's collective-bargaining agreement, which granted the employer the right to impose

reasonable work and safety rules, and provided for resolution of contract-disputes through grievance and arbitration.

The parallel to the instant case is exact. Given, as the majority found and as the Petition does not dispute, that Massachusetts has not absolutely banned drug-testing, the ultimate test of L-Corp.'s drug-screen was its "reasonableness" in the light of the specific circumstances. (App. 35a-36a) State-law privacy claims have at their core the individual's right to be free of objectively unreasonable searches or intrusions. See Restatement (Second) of Torts § 652B (1977). The scope of an employee's privacy-rights in the workplace, as against his employer's

business interests, therefore depends on the specific circumstances of his employment. It is this principle which underlies the balance-of-interests test which, as the majority found and the Petition does not dispute, governs the adjudication of workplace-privacy disputes under Massachusetts law.

Moreover, the highly regulated character of an industry and the nature of the workplace bear directly on the justification for intrusions on an employee's workplace-privacy. In Skinner v. Railway Labor Executives Association, ____ U.S. _____, 4 IER Cases 224 (March 21, 1989), this Court held that the drug-urinalysis mandated by federal railroad-safety regulations for private railroad employees was a

"reasonable" search under the Fourth Amendment, notwithstanding lack of individualized suspicion of drug-use. The Court ruled that the employees occupied safety-sensitive positions in an industry which is pervasively regulated by the federal government in the interest of public safety, and that their legitimate privacy-expectations were overridden by the government's compelling safety-interests. 4 IER Cases at

237-238.[8/] (See further the authorities cited on this point by the majority at App. 17a-19a.)

8/ In view of the undisputed parallelism between federal and state constitutional adjudication (App. 19a-20a), there is every likelihood that the SJC will follow Skinner in future Massachusetts privacy cases involving mandatory, no-cause drug-testing of employees in an industry which is regulated for public safety purposes. Consequently, there is no warrant for summary reversal and remand of this case to the First Circuit for further consideration in the light of Horsemen's supra, 532 N.E.2s 644, as requested by the Petition at 26, n.6. This Court in Skinner has, in effect, answered the public safety question which, as seen at pp. 35-36, supra, the SJC left open in Horsemen's.

The circumstances of a unionized worker's employment are defined by the collective-bargaining agreement. Here, as in Utility Workers, the employer was engaged in an industry which is pervasively regulated by the federal government in order to ensure public health and safety. Considering these "exigencies" of its industry (App. 38a), L-Corp. had an undeniable interest in determining whether its employees were drug-free. (App. 26a) Whether any action by L-Corp. in pursuit of that interest justifiably intruded on the employees' legitimate workplace privacy-expectations would necessarily

depend on the provisions of the Agreement, since it had established all of the parties' rights and obligations. To the extent that L-Corp's drug-screen can even be deemed a "search and seizure," it related to the urine specimens which the employees were already required to furnish under the pre-existing federal safety-regulations. It was the federal regulations which had legitimately intruded on Jackson's urologic privacy in the first instance. And the issue of whether the unilaterally implemented drug-screen unjustifiably invaded Jackson's already diminished expectations, manifestly hinged on whether it was an appropriate exercise of L-Corp.'s management rights under the

Agreement. As the majority found (App. 40a, 44a), the "reasonableness" of the drug-screen could be tested only under the grievance and arbitration provisions of the Agreement, remedies which neither Jackson nor his union attempted to invoke. Therefore, following Utility Workers, the majority concluded that the Agreement was the sole source of the elements of the state-law test for resolving the asserted state-law claims; hence the state-claims were pre-empted.

The majority's ruling, like the identical ruling in Utility Workers, accords with the substantial weight of federal authority on § 301 pre-emption of state tort claims by unionized employees against employer-mandated drug-testing. Strachan v. Union Oil Co., 768 F.2d 703

(5th Cir. 1985). Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988). Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987). See Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp. 183 (D.Or. 1986)

CONCLUSION

The Petition has not raised any special or important reason for granting review of the majority's decision in this

case. Accordingly, the Petition should be denied.

Respectfully submitted,

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